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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No. 180

KENNETH L. ELGES,
Petitioner,

vs.

STATE OF NEVADA.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of Nevada
AND
BRIEF IN SUPPORT THEREOF.

GEORGE L. VARGAS,
400 Ryland Building, Reno, Nevada,
Attorney for Petitioner.

MILTON W. KING,
Southern Building, Washington, D. C.,
Of Counsel.

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In the Supreme Court
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OCTOBER TERM, 1952

No.

KENNETH L. ELGES, *Petitioner,*

vs.

STATE OF NEVADA.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of Nevada.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Kenneth L. Elges, prays the issuance of a Writ of Certiorari and states:

I.
STATEMENT OF THE MATTER INVOLVED.

Petitioner is a physician and at the time of the offense charged was practicing under license in Reno,

Nevada. Petitioner and Jules Golding were indicted by the Grand Jury of Washoe County, Nevada, upon a charge that they "did willfully, unlawfully and feloniously and with intent to produce the miscarriage of a woman, to-wit: Juanita Faye Andersen, use and cause to be used, certain instruments in and upon the body of said Juanita Faye Andersen, the same not being necessary to preserve the life of said Juanita Faye Andersen or that of the child whereof she was pregnant."

The Statute of Nevada (Nevada Compiled Laws, 1929, Sec. 10129) provides:

> "Every person who, with intent thereby to produce the miscarriage of a woman, unless the same is necessary to preserve her life or that of the child whereof she is pregnant, shall * * * use, or cause to be used, any instrument or other means; shall be guilty of abortion, * * *."

Trial was had to a jury following petitioner's plea of "Not Guilty." Petitioner offered no evidence at the trial. At the close of the State's case, Golding asked and obtained leave to change his plea from "Not Guilty" to "Guilty". A verdict of "Guilty as Charged" was rendered by the jury against petitioner. Judgment was entered October 29, 1951, and he was sentenced to imprisonment in the Nevada State Prison for not less than one year nor more than five years. Subsequently, the court granted probation upon condition that respondent serve one year in the county jail, which is the minimum sen-

tence permitted under the statute. Petitioner is free on bail pending this application for writ of certiorari.

After the trial court denied petitioner's motion for new trial, petitioner appealed to the Supreme Court of Nevada from the judgment and refusal to grant new trial. That court affirmed the judgment in an opinion and order dated December 29, 1952 (251 P. 2d 590) and on ~~February~~ March 11, 1953, denied, without opinion, a petition for rehearing. The affirmation of the judgment was by a divided court; Judge Eather dissented and wrote a vigorous opinion. On June 3, 1953, this Court extended until July 15, 1953, the time within which petition for writ of certiorari could be filed.

At the trial, the court permitted evidence by eight witnesses as to six other alleged abortions performed by petitioner prior to and unconnected with the act charged in the indictment. Six of those witnesses were the women upon whom the operations were said to have been performed by petitioner. The evidence of those offenses did not contain all the elements of a criminal act. Three of the women gave testimony from which it might be inferred that an instrument was used; one said she did not remember any instrument; another said she did not notice any instrument; and the sixth said only that she saw instruments in a sterilizer. None of them testified as to her condition of health and there was no evidence as to any one of the six that the alleged abortion was not necessary to save her life or that of her child. Con-

sequently, all those abortions, if true, could have been lawful; none of them contained all the essentials of criminal abortion under the statute.

All that testimony was objected to by petitioner as irrelevant and immaterial and not within the scope of the indictment; the objections were overruled. On appeal, appropriate assignments of error were directed to the rulings of the court in the admission of that evidence and to the charge of the court to the jury in that regard.

The prosecuting attorney offered the evidence "for the purpose of showing the plan and scheme of these defendants and with an element of intent." The trial judge said:

> "It will not be considered as evidence of another and distinct crime, but for a limited purpose only, and the jury will be properly instructed in that regard."

He charged the jury as follows:

> "Evidence was offered in this case for the purpose of showing that the defendant, Kenneth L. Elges, committed other acts of a similar nature, other than the one of which he is accused and for which he is on trial in this action, namely, the use of instruments in and upon the body of one Juanita Faye Andersen, with the intention of producing a miscarriage.
>
> Such evidence was received for a limited purpose only: not to prove distinct offenses or continual criminality, but for such bearing, if any, as it might have on the question whether the

defendant is innocent or guilty of the crime charged against him in the Indictment.

You are not permitted to consider that evidence for any other purpose, and as to that purpose you must weigh such evidence as you do all other in the case.

The value, if any, of such evidence depends on whether or not it tends to show that the defendant entertained the intent which is a necessary element of the alleged crime for which he now is on trial, as pointed out in other of my instructions."

Petitioner contended in the Supreme Court of Nevada that the admission of that evidence was prejudicial error which deprived him of a fair trial and of due process promised him under the Fourteenth Amendment. He continues to so believe. He says it is especially so because of the State's failure, in his opinion, to prove the use of an instrument upon Mrs. Andersen as charged in the indictment and a necessary ingredient of criminal abortion under the statute.

The only evidence of the use of an instrument on the body of Mrs. Andersen was her testimony and that of her family physician. She said that she saw an instrument in defendant's hand and it was eight or ten inches long, not as large around as a pencil and it looked as though it had a hook on it. She did not say the instrument was used upon her. The physician, Dr. Wald, testified that he examined Mrs. Andersen about a week after the alleged abortion and

he found evidence of an abortion and the use of an instrument. Neither Dr. Wald nor any other witness identified the instrument described by Mrs. Andersen as one which had any utility value in the performance of such an operation.

Mrs. Andersen was a married woman who had three children and testified she "couldn't afford another one."

Petitioner believes that the evidence against him relevant to the indictment was insufficient but in any event, the testimony as to other alleged abortions was prejudicial and he is entitled to a new trial.

II.

THE JURISDICTION OF THIS COURT.

Petitioner claims that the admission of the evidence as to other alleged abortions was so prejudicial as to deny him a fair trial and violate the due process clause of the Fourteenth Amendment. Therefore, this Court has jurisdiction, since petitioner has been denied relief by the highest court in Nevada. That court has decided a Federal question of substance in a way not in accord with applicable decisions of this Court.

The opinion of the majority of the members of the Supreme Court of Nevada states that they did not deem it necessary to determine the correctness of the ruling of the trial judge as to the admissibility

of the evidence of other alleged abortions, because "there was no issue in the evidence upon which the testimony of other offenses might have swayed the jury". They held that there was sufficient proof of the offense charged. They cited in support of their decision a California case (*People v. Northcott*, 189 P. 2d 704) where the court said the State had "sustained a greater burden than required. There is no failure of proof, but merely an excess of proof" and "we would not be justified in setting aside a verdict of the jury because the district attorney has proved more than was necessary in order to make out his case." The majority opinion in petitioner's case stated as follows:

> "In any event we should be compelled to hold that its admission was not prejudicial under sec. 11266, N. C. L. 1929. That section provides: 'No judgment shall be set aside, or new trial granted in any case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter or pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice, or has actually prejudiced the defendant, in respect to a substantial right.' "

In petitioner's written motion for rehearing before the Supreme Court of Nevada, among the opening words, petitioner stated that the Supreme Court of Nevada by its decision "is approving the denial of

the right to a fair trial and due process, which are promised in the Constitution of the United States."

The decision of the Supreme Court of Nevada necessarily became a determination by that court that petitioner's rights under the Fourteenth Amendment had not been violated and it was a refusal by that court to give relief.

III.

QUESTION PRESENTED.

In a trial for criminal abortion by instrument upon the body of one person, is the admission of evidence of other alleged abortions (not shown to be criminal) by defendant prejudicial to him so as to violate the Fourteenth Amendment and entitle him to a new trial?

IV.

REASONS FOR THE WRIT OF CERTIORARI.

Petitioner contends that the decision of the Supreme Court of Nevada necessarily results in a denial of petitioner's claim that the evidence erroneously admitted resulted in such prejudice as to deny him a right to a fair trial, guaranteed by the Fourteenth Amendment.

This Court has said, in *Brown v. Mississippi*, 297 U. S. 278, 80 L. ed. 682:

> "The state is free to regulate the procedure of its courts in accordance with its own conceptions of policy, unless in so doing it 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' * * * But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law."

In *Hebert v. Louisiana,* 272 U.S. 312, 71 L. ed. 270, this Court said:

> "What it (the Fourteenth Amendment) does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' Those principles are applicable alike in all the states and do not depend upon or vary with local legislation."

Petitioner believes the judgment against him is erroneous because it was not in conformity with those pronouncements of this Court.

Wherefore, petitioner prays that a writ of certiorari issue from this Court directed to the Supreme Court of the State of Nevada commanding said court to certify and send to this Court a full and complete transcript of the record and of the proceedings in the case of the *State of Nevada, Respondent v. Kenneth L. Elges, Appellant,* No. 3693, to the end that the cause may be reviewed and determined by this

Court as provided for by the Constitution and Statutes of the United States; that the judgment of said Supreme Court of Nevada be reversed by this Court, and such other relief granted as this Court may deem proper.

Dated, Reno, Nevada,
July 10, 1953.

GEORGE L. VARGAS,
Attorney for Petitioner.

MILTON W. KING,
Of Counsel.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1952

No.

KENNETH L. ELGES,
Petitioner,
vs.
STATE OF NEVADA.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE ADMISSION OF THE EVIDENCE AS TO OTHER OFFENSES WAS ERROR.

Petitioner was charged with criminal abortion upon Juanita Andersen,—no other person. He was entitled to be tried on that charge alone. There was no evidence from which even an inference could be drawn that any of the other alleged offenses was connected in any way with the Andersen matter. The reason given by the prosecuting attorney for introducing the evidence was stated by him as follows:

> "* * * this evidence is offered for the purpose of showing the plan and scheme of these defendants and with an element of intent."

The trial judge told the jury that it was received "for such bearing, if any, as it might have on the question whether the defendant is innocent or guilty of the crime charged against him in the indictment" and he also charged the jury:

> "The value, if any, of such evidence depends on whether or not it tends to show that the defendant entertained the intent which is a necessary element of the alleged crime for which he now is on trial."

The rule in Nevada concerning the admissibility of evidence of other offenses was stated in *State v. Skaug,* 63 Nev. 59, 161 P. 2d 708, as follows:

> "It is well settled that evidence that accused has committed another crime independent of and unconnected with the one for which he is on trial, is inadmissible. The rule has well established exceptions and both have received the attention of this court in a number of cases. State v. McMahon, 17 Nev. 365, 30 P. 1000; State v. Vaughan, 22 Nev. 285, 39 P. 733; State v. Roberts, 28 Nev. 350, 82 P. 100; State v. McFarlin, 41 Nev. 486, 172 P. 371; State v. Monahan, 50 Nev. 27, 249 P. 566; State v. Hall, 54 Nev. 213, 13 P. 2d 624; State v. Behiter, 55 Nev. 236, 29 P. 2d 1000."

In the previous case of *State v. McFarlin,* 41 Nev. 486, 172 P. 371, the Supreme Court of Nevada approved the statement made in the leading case of

People v. Molineaux, 168 N.Y. 264, 61 N.E. 286, and said:

> "It is the general rule that evidence of the perpetration of distinct crimes from those for which a defendant is being tried will not be considered. There are, however, exceptions to this general rule. In the well-known case of People v. Molineaux, 167 N. Y. 263, 61 N. E. 286, 62 L.R.A. 193, this question was considered at length, and it was held that, generally speaking, evidence of other crimes might be considered only when it tends to establish either (1) motive; (2) intent; (3) absence of mistake or accident; (4) a common scheme or plan, embracing the commission of two or more crimes so related to each other that proof of one tends to establish the others; or (5) the identity of the person charged with the commission of the crime for which the defendant is being tried. Such is, we think, the correct rule."

In Wharton's Criminal Evidence, Vol. 1, Section 343, it is said:

> "* * * Certainly, evidence to show that the accused committed an offense which was in no way connected with the crime charged is not admissible. * * *"

Section 344:

> "Several reasons prevail for the exclusion of evidence of independent, disconnected crimes. When a person is put on trial for an offense, he is to be convicted, if at all, by evidence which shows that he is guilty of that offense, and not by evidence showing him guilty of other offenses wholly unconnected with the one charged. A man cannot

be convicted of crime because he is a bad man generally or has committed other crimes for which he has not been punished. Evidence of other crimes, when offered in chief, violates both the rule of policy which forbids the state initially to attack the character of the accused and the rule of policy that bad character may not be proved by particular acts. Moreover, the accused would not be given notice by the charges in the indictment as to what the evidence was to be as to such collateral crimes. The proof of the guilt of an offense not connected with the one for which the accused is being tried finds the accused unprepared to meet it with evidence, leads the mind away from the issue to be determined, and has a tendency to prejudice the minds of the triers against the accused and to predispose them to a belief in his guilt. Finally, the rule is universal that the evidence on a trial must be confined to the question in issue."

The opinion in *Laughlin v. United States,* 92 F. 2d 506, quotes from the *Molineaux* case as follows:

> "In People v. Molineaux, 168 N. Y. 264, 61 N. E. 286, the court said: 'This rule so universally recognized and so firmly established in all English-speaking lands, is rooted in that jealous regard for the liberty of the individual which has distinguished our jurisprudence from all others at least from the birth of Magna Charta.' "

The leading case in this Court is *Boyd v. U. S.,* 142 U.S. 450, 35 L. ed. 1077, where alleged robberies committed by defendant were received in evidence at his trial for murder. This Court said:

"But we are constrained to hold that the evidence as to the * * * robberies was inadmissible * * * for any * * * purpose whatever, and that the injury done the defendants in that regard, was not cured by anything contained in the charge. Whether Standley robbed Brinson and Mode, and whether he and Boyd robbed Hall, were matters wholly apart from the inquiry as to the murder of Dansby. They were collateral to the issue to be tried. No notice was given by the indictment of the purpose of the government to introduce proof of them. They afforded no legal presumption or inference as to the particular crime charged. Those robberies may have been committed by the defendants in March, and yet they may have been innocent of the murder of Dansby in April. Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. * * * However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.

The judgment is reversed, and the cause remanded, with directions to grant a new trial."

And again, in *Hall v. U. S.*, 150 U.S. 76, 37 L. ed. 1003, this Court enforced the rule and granted a new trial because evidence of a former killing was erro-

neously admitted in a trial for murder. The opinion says:

> "The presiding judge, by declining to interpose, * * * gave the jury to understand that they might properly and lawfully be influenced by it; and thereby committed a grave error, manifestly tending to prejudice the defendant with the jury, and which, therefore, was a proper subject of exception, and, having been duly excepted to, entitles him to a new trial."

Petitioner contends that when the State gave evidence, as it did, that Mrs. Andersen did not require an abortion to save her life or her child's and that an abortion had been performed, proof of criminal intent was inherent in the act and no further proof of intent was required. The receipt of evidence of the other alleged offenses cannot be justified on the ground of proof of intent. If petitioner had admitted some participation but asserted it was with good intent, the element of intent would have been placed in issue.

There is no case in the Nevada reports involving the precise question. The Supreme Court of Utah has discussed the matter fully and we quote from *State v. Cragun,* 38 P. 2d 1071, as follows:

> "The defendant would be guilty if he procured, or attempted to procure, a miscarriage upon the prosecutrix, unless the same was necessary to preserve her life. The state, under the plea of not guilty which the defendant entered, was compelled to prove as part of its case that the defendant

in procuring the miscarriage was not doing so in an effort to save the life of the prosecutrix. In order to make that proof, the prosecutrix testified that her health was good at the time she went to the defendant's office. She detailed the purpose of her visit and the agreement she made with the defendant for the services that he was to render. Other physicians were called who also testified as to the condition of the prosecutrix at the time she was making the visits to the defendant's office. *The criminal intent necessarily followed from the performance of the act.* (Emphasis supplied.)

No claim or intimation was made by the defendant that he had performed the operation or that it was necessary to save the life of the prosecutrix. Had he done so, then evidence of the commission, or attempted commission, of other abortions, would have been relevant and material.

* * *

Where the state is able to prove, as it did in the case at bar, the commission of the act and that its performance was not necessary to save the life of the woman, then the criminal intent of the defendant has been shown, and evidence of other abortions on other and entirely different women is not relevant nor competent. If the defendant, although he had pleaded not guilty, claimed that the act was necessarily performed in an effort to save the life of the woman, then in rebuttal of such claim the state might well offer evidence of other abortions attempted or committed by the defendant for the purpose of disproving such claim and showing his intent in the performance of the acts for which he is being tried."

In *People v. Lonsdale,* 81 N.W. 277, 122 Mich. 388, the court said:

> "Where the intent of guilty knowledge is a necessary conclusion from the act done, proof of other offenses of a similar character is inadmissible and violates the rule that the evidence must be confined to the issue. Upon the record, there is no room for an inference that death resulted from accident, or that the operation was performed to save the life or health of the deceased. On the contrary, if the jury found that the dying declaration of the deceased was true, the crime was complete, and the jury could not find otherwise than that it was done with guilty knowledge and intent."

WAS THE ERROR PREJUDICIAL?

The majority members of the Supreme Court of Nevada determined that the admission of the evidence as to other alleged offenses was not prejudicial. They rested their decision upon a statute (N. C. L. Sec. 11266) which provides as follows:

> "No judgment shall be set aside, or new trial granted, in any case on the ground of misdirection of the jury or the improper admission or rejection of evidence, or for error as to any matter or pleading or procedure, unless in the opinion of the court to which application is made, after an examintaion of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice, or has actually prejudiced the defendant, in respect to a substantial right."

Petitioner makes no attack upon the statute but he does contend that its interpretation and application in this instance are unconstitutional and deprive him of due process of law.

That provision is similar to Rule 52 of Criminal Procedure in Federal Courts (which is a restatement of former law) and to statutes and constitutional provisions in other states.

This Court has spoken recently on that point. In *Bollenbach v. U. S.*, 326 U. S. 607, 90 L.ed. 350, the opinion states:

> "In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts.
>
> * * * All law is technical if viewed solely from concern for punishing crime without heeding the mode by which it is accomplished. The 'technical errors' against which Congress protected jury verdicts are of the kind which led some judges to trivialize law by giving all legal prescriptions equal potency. See Taft, Administration of Criminal Law (1905) 15 Yale LJ 1, 15. Deviations from formal correctness do not touch the substance of the standards by which guilt is determined in our courts, and it is these that Congress rendered harmless. * * * From presuming too often all errors to be 'prejudicial', the judicial

> pendulum need not swing to presuming all errors to be 'harmless' if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be. Judgment reversed."

Although the court was considering trials in the Federal Courts, petitioner here contends that the right to a fair trial is universal in our land and guaranteed in every jurisdiction and that the error in his trial was so grievous as to deny him a basic right.

Petitioner respectfully suggests that this Court has stated the law applicable to the instant situation in its opinion in *Stein v. New York,* No. 391, October Term, 1952, rendered June 15, 1953. These words appear on page 34 of the majority opinion as printed:

> "Of course, where the judge makes a final determination that a confession is admissible and sends it to the jury as a part of the evidence to be considered on the issue of guilt and the ruling admitting the confession is found on review to be erroneous, the conviction, at least normally, should fall with the confession."

Substituting the words "evidence of other alleged abortions" for the words "a confession" in that quo-

tation, we have a garment that perfectly fits the form presented by the record in petitioner's case.

In *Kotteakos v. U. S.*, 328 U. S. 750, 90 L.ed 1557, this Court said:

> "The only question is whether petitioners have suffered substantial prejudice from being convicted of a single general conspiracy by evidence which the Government admits proved not one conspiracy but some eight or more different ones of the same sort executed through a common key figure, Simon Brown. * * *
>
> * * * * * * *
>
> * * * Thus, it is not the appellate court's function to determine guilt or innocence. Weiler v. United States, supra (323 US at 611, 89 L.ed 499, 65 S Ct 548, 156 ALR 496); Bollenbach v. United States, 326 US 607, 612, 613, ante, 350, 354, 355, 66 S Ct 402. Nor is it to speculate upon probable reconviction and decide according to how the speculation comes out. Appellate judges cannot escape such impressions. But they may not make them sole criteria for reversal or affirmance. Those judgments are exclusively for the jury, given always the necessary minimum evidence legally sufficient to sustain the conviction unaffected by the error. Weiler v. United States, and Bollenbach v. United States, both (US) supra.
>
> * * * And the question is, not were they right in their judgment, regardless of the error or its effect upon the verdict. It is rather what effect the error had or reasonably may be taken to have had upon the jury's decision. The crucial thing is the impact of the thing done wrong on the minds

of other men, not on one's own, in the total setting. * * *

This must take account of what the error meant to them, not singled out and standing alone, but in relation to all else that happened. And one must judge others' reactions not by his own, but with allowance for how others might react and not be regarded generally as acting without reason. This is the important difference, but one easy to ignore when the sense of guilt comes strongly from the record.

If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno v. United States, supra (308 US at 294, 84 L.ed 260, 60 S. Ct 198). But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

There is such a host of other cases where the courts have determined that errors of like or lesser degree have been prejudicial that it is impossible to under-

stand how the Supreme Court of Nevada could reach the conclusion it did.

Professor Wigmore has said (Evidence, Third Edition, Sec. 194):

> "The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."

A wise and experienced judge said many years ago, in *State v. Saunders,* 12 P. 441:

> "Place a person on trial upon a criminal charge, and allow the prosecution to show by him that he has before been implicated in similar affairs, no matter what explanation of them he attempts to make, it will be more damaging evidence against him, and conduce more to his conviction, than direct testimony of his guilt in the particular case. Every lawyer who has had any particular experience in criminal trials knows this,—knows that juries are inclined to act from impulse, and to convict parties accused upon general principles. An ordinary juror is not liable to care about such a party's guilt or innocence in the particular case if they think him a scapegrace or vagabond. This is human nature. The judge might demurely and dignifiedly tell them that they must disregard the evidence, except so far as it tended to impeach the testimony of the party; but what good would that do?"

California has a constitutional provision (Sec. 4½ of Art. VI) similar to the Nevada statute (N.C.L. 11266). In *People v. Duvernay,* 111 P. 2d 659, defendant was charged with peddling narcotics. The district attorney, addressing the jury, said:

> "I don't know whether this defendant is a user or not. * * * The defendant has many of the characteristics of a user of narcotics."

After conviction and on appeal, the district attorney argued that the remarks were not prejudicial because there was ample evidence of guilt and he invoked the provision of the Constitution. The court said:

> "Such remarks constituted misconduct, and of the fact that such misconduct was prejudicial there can be little doubt. To entertain a contrary view is to ignore human experience and the dictates of common sense. * * *
>
> * * * we do not regard the evidence as sufficient to put into operation the provisions of section 4½ of Article VI of the Constitution because even convincing proof of a defendant's guilt does not necessarily mean, under all circumstances that there has been no miscarriage of justice. * * * When a defendant is denied that fair and impartial trial guaranteed by law, such procedure amounts to a denial of due process of law. Powell v. Alabama, 287 U.S. 45; 53 S.Ct. 55.
>
> * * * * * * *
>
> It is the bounden duty of courts to insist that a defendant be fairly convicted, because if he is not

so convicted he should not be convicted at all; * * *. The fact that the evidence may point rather conclusively to defendant's guilt does not take from the latter his right to such a fair and impartial trial."

In *People v. Sarazzawski,* 161 P. 2d 934, 27 Cal. 2d 7, the court said:

"When a defendant has been denied any essential element of a fair trial or due process, even the broad saving provisions of section 4½ of article VI of our state Constitution cannot remedy the vice and the judgment cannot stand. (citing cases.) That section was not designed to 'abrogate the guaranties accorded persons accused of crime by other parts of the same Constitution or to overthrow all statutory rules of procedure and evidence in criminal cases. When we speak of administering "justice" in criminal cases, under the English or American system of procedure, we mean something more than merely ascertaining whether an accused is or is not guilty. It is an essential part of justice that the question of guilt or innocence shall be determined by an orderly legal procedure, in which the substantial rights belonging to defendants shall be respected.' "

The Court of Appeals in New York has used strong words in this connection. In *People v. Mleczko,* 81 N.E. 2d 65, 298 N.Y. 153, it said:

"* * * no one may deny that the record contains evidence sufficiently convincing to warrant a verdict of guilty. However, errors fundamental

and grievous, errors which went to the very heart of the issue, compel reversal and a new trial.

* * * * * * *

"In short, receipt of the evidence referred to, its emphatic reiteration by the prosecutor, and the court's refusal to instruct as requested (that defendant's failure to speak should not be taken against him) concerning defendant's silence, constituted a series of errors capable of working incalculable harm upon defendant, errors so basic and substantial as to defy evaluation.

* * * Vicious though the crime was, convincing though the evidence of guilt may seem to be, we could affirm only if we were to announce a doctrine that the fundamentals of a fair trial need not be respected if there is proof in the record to persuade us of defendant's guilt. We are not prepared to announce such a doctrine. * * * It is for jurors, not judges of an appellate court such as ours, to decide the issue of guilt."

That case followed *People v. Nuzzo,* 62 N.E. 2d 47, 297 N.Y. 227, where the court said:

"Thirty years ago this court had occasion to comment upon abuses on the part of prosecuting officers and carelessness on the part of trial courts in disregarding errors of major importance in the trial of criminal cases whenever the judge was satisfied that defendant was guilty. We are prompted by our examination of records in this court disclosing many shocking instances of abuse on the part of prosecuting officers which we have been asked to ignore, to say again what was said

in People v. Marendi, 213 N.Y. 600, 619-620, 107 N.E. 1058, 1064:

'Are we then to disregard errors no matter how substantial, if upon a review of the evidence we are satisfied with the verdict of the jury? Such a course would simply mean in the long run the abolishing of all forms of law taught by experience to be necessary to the protection of the innocent, and the decision of criminal cases on appeal solely on the facts. If trial by jury is to be maintained, the right of every accused person to be tried in accordance with established forms of law must be respected. If the errors in question had related to matters upon which but one decision, and that adverse to the defendant, could reasonably have been reached, it might be permissible to overlook them, but where prejudicial matter is erroneously received in evidence on a disputed question of fact, its harmful character cannot be determined solely by the mere weight of competent evidence unless we are to resolve ourselves into a jury and, ignoring the finding upon incompetent evidence, substitute one upon the evidence which we may deem competent.

In this case highly prejudicial matter was received in evidence on a vital issue in utter disregard of a fundamental rule of evidence firmly established in our jurisprudence, and the jury were permitted to find the defendant guilty of murder in the first degree on a theory which ought not to have been submitted to them, whereas they might reasonably have found a verdict in a lesser degree on the rightful theory. Under those circumstances, we cannot affirm without establishing the rule

that the forms of law need not be respected if the evidence convinces us of the defendant's guilt. We are not prepared to establish such a rule.' "

The Supreme Court of Michigan has expressed a similar opinion under a statute like the Nevada act. In *People v. Bigge,* 285 N.W. 5, 288 Mich. 417, that court said:

"We are urged to notice the guilt of defendant appearing in this record and affirm the conviction under the authority of Comp. Laws 1929, Sec. 17354 which reads: 'No judgment or verdict shall be set aside or reversed or a new trial be granted by any court of this state in any criminal case, on the ground of, misdirection of the jury, or the improper admission or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court, after an examination of the entire cause, it shall affirmatively appear that the error complained of has resulted in a miscarriage of justice.'

That statutory provision is not a cure-all for it must serve within constitutional limitations or else be declared void. Minor errors which clearly can be held not to have affected the result may be mollified by this statutory provision, but errors which deprive an accused of the right of due process of law cannot be composed thereby to the detriment of an accused. The responsibilty of maintaining the right of fair trial and due process of law is placed with the judicial branch and cannot be otherwise by legislative permission. We are not concerned with the guilt or innocence of the accused, for we are not triers of the facts and

must apply the law to the case as tried. * * * The prosecutor, by such statement of intended proof of defendant's guilt, brought an effect so probable, so inadmissible and so prejudicial as to constitute irreparable error. * * *

* * * In the maintenance of right of trial by jury and full integrity of its incidents we are constrained by the mentioned error to reverse the conviction and remand the case for a new trial."

And in Oregon we find this expression of the court in *State v. Estabrook,* 91 P. 2d 838, 162 Ore. 476:

"Counsel for the respondent invoke Sec. 3 of Article VII of the Constitution of Oregon and ask that the judgment appealed from be affirmed regardless of any error that may have been committed by the trial court. That section, in our opinion, should not be applied when a plain, specific and mandatory provision of the Constitution has been violated, as was sec. 6 Article I, supra, in the case at bar."

That is the attitude in Nebraska where the court has said (*Wilson v. State,* 34 N.W. 2d 880, 150 Neb. 436):

"The effect of this statute is not however to authorize this court to declare that there has been no substantial miscarriage of justice in a criminal case merely because the court from an examination of the evidence may believe the defendant guilty of the crime charged.

This court has held that where a substantial right of a defendant has been invaded or abridged this statute may not be effective to sustain a conviction."

In *Smith v. State,* 10 So. 2d 352, 193 Miss. 474, the state of Mississippi spoke in a similar tenor, through the opinion of the court, as follows:

> "The state further says that Smith cannot take advantage of this because his own testimony shows that he is guilty, citing Graham v. State, 179 So. 340, and King v. State, 188 So. 554. Admitting for the sake of the rule, that the evidence so proves, yet it is stated in the Graham case that the rule does not apply where the error is 'so grave as to deny the accused a fundamental right,' and in the King case that, where the conviction is adequately sustained by the testimony of the defendant himself, 'any error in order to work a reversal must be one which obviously is obnoxious to the indispensable fundamentals of criminal procedure.' This evidence, so introduced, is within both exceptions."

In another New York case (*People v. Hetenyi,* 106 N.E. 2d 20, 304 N.Y. 80) evidence was admitted that defendant had been a clergyman who had often changed churches and beliefs and the prosecuting attorney commented on it to the jury. The Court of Appeals said:

> "Thus the prosecution breached a firmly established rule of our law which in People v. Zackowitz, 254 N.Y. 192, 197, 172 N.E. 466, 468, was stated by Cardozo, C.J. in this way: 'Fundamental hitherto has been the rule that character is never an issue in a criminal prosecution unless the defendant chooses to make it one. * * * In a very real sense a defendant starts his life afresh when he stands before a jury, a prisoner at the

bar.' See Wigmore on Evidence (3d ed.) secs 57, 192. The rule thus forcibly expressed is a rule of fundamental fairness in the protection of the individual against unjust prosecution and is inflexibly enforced in our courts. Hence, we may not overlook a breach thereof as not affecting the substantial rights of an accused within the meaning of section 542 of the Code of Criminal Procedure, 'when the purpose and effect of the breach is to create prejudice against the defendant by proof that his character is bad, even if the evidence convinces us of the defendant's guilt.' People v. Nuzzo, 294 N.Y. 227, 234, 62 N.E. 2d, 47, 50."

In *People v. Cheney,* 13 N.E. 2d 171, 368 Ill. 131, defendant was found guilty of causing death by abortion. Evidence as to other abortions was received but was later stricken and the jury told to disregard it. A written instruction to that effect, however, was refused. The conviction was reversed, the court saying:

"* * * It is difficult to calculate the harm done defendant by having this testimony with the jury for several hours. The defendant was entitled to every legal protection during the course of the trial so his fate could be determined solely upon facts legally in evidence against him. * * *

The errors complained of and considered in this opinion were of such a character as to deprive the defendant of a fair and impartial trial."

And in *State v. Choate,* 46 S.E. 2d 476, 228 N.C. 491, evidence of other abortions had been received during the trial but stricken and the trial judge

charged the jury to disregard it. The Appellate Court reversed a conviction, saying (quoting from a Washington case):

> "There is no more insidious and dangerous testimony than that which attempts to convict a defendant by producing evidence of crimes other than the one for which he is on trial."

In *People v. Talle,* 245 P. 2d 633, the district attorney called defendant as a witness and defendant declined to testify, after the judge informed him he could not be compelled to do so. Later, defendant testified in his defense. The district attorney cross-examined him as to his reason for previously declining to testify. Later, the district attorney commented on that to the jury. The court said:

> "These words * * * constitute a flagrant, shocking and prejudicial invasion of appellant's constitutional rights."

Courts have noted a tendency on the part of prosecuting attorneys to rely upon the statute concerning a miscarriage of justice or a lack of prejudice. In *People v. Duvernay,* 111 P. 2d 659, 43 Cal. App. 823, the court said:

> "Pertinent indeed to the situation with which we are here confronted are the remarks of the court in People v. Black, 73 Cal. App. 13, 43, 238 P. 374, 387, wherein it was said: 'We feel impelled to direct the attention of district attorneys and trial judges to the frequent occasion which is thrust upon us to save judgments of conviction by means of the provisions of section 4½ of ar-

ticle 6 of the Constitution. It seems evident that the prosecutors of the state, and possibly that the trial judges, are conducting criminal cases with an eye to the saving grace of the section. It should be manifest that such a course is improper. In the performance of their respective duties incident to trials, the existence of the section is of no concern to those officers.' "

In *State v. Roderiquez,* 31 Nev. 342, 102 P. 863, the Supreme Court of Nevada said:

"It seems to be a peculiar trait and ambition of some prosecuting attorneys, carried away through misguided zeal, to *overprove* their case when a conviction is otherwise certain, and to exert their skill and ingenuity in seeing how far they can trespass on the verge of error, and, generally in so doing, trespass upon the rights of the accused, thus causing the necessity of courts of last resort to reverse causes and order new trials, to the expense and detriment of the commonwealth and all concerned."

It would have been error for the court to admit evidence against respondent containing all the statutory elements of criminal abortion, which was the crime charged in the indictment, but the evidence admitted did not show that any one of the six other alleged offenses had been committed to save life. Nor was there proof that all others had been committed with assistance of instruments. Under the Nevada statute, both elements are essential to constitute a crime.

In *People v. Rongetti,* 170 N.E. 14, 338 Ill. 56, defendant was tried and convicted of manslaughter for the death of a woman upon whom he was performing an abortion. A witness who apparently saw the operation performed on deceased was asked if she had "ever seen any operation prior to that time by Dr. Rongetti in that room similar to the one you have described" and she answered "Yes, sir." Then the witness was permitted to testify about three or four operations she had witnessed but she did not ascertain the circumstances surrounding each to be able to say whether it was criminal. The Supreme Court granted a new trial, saying:

> "* * * The witness should have been required to testify as to the details of each of the operations to which she referred, so that the court might be able to judge as to whether or not such operations were criminal, and tended to show a guilty intention on the part of the accused in doing the act with which he was charged by the indictment in this case."

The court also said:

> "* * * Where the intent with which an alleged offense was committed is a material element of the charge, and such intent becomes an issue on the trial, proof of former similar offenses, within reasonable limits, is admissible as tending to throw light upon the intention of the accused in doing the act charged, and is competent in cases of this character. (citing cases) Evidence of other similar offenses, to be competent as proof of guilty knowledge, must show that such alleged

similar offenses were, in fact, criminal offenses. (Citing cases in Ill.) It must be kept in mind, however, that proof of similar offenses is not admissible to prove that the defendant committed the act charged, but is only to be considered by the jury in determining the intent with which the act charged was done, where the jury are satisfied by the other testimony that the defendant committed the act charged in the indictment. The admission of evidence of similar offenses in a case of this character is an exception to the general rule, and, unless it is kept within the limitations pointed out by the authorities, it might result in denying the prisoner that fair and impartial trial guaranteed by law, and might break down those barriers erected by the law and designed for the protection of the innocent."

State v. Willson, 233 P. 259, 113 Ore. 450 (prior opinion in 230 P. 810, 113 Ore. 450), is another case dealing with the admissibility in an abortion case of evidence of other offenses. We quote from the opinion:

"The woman named in the indictment, when called as a witness for the prosecution, detailed the circumstances of the offense charged in the indictment, locating the time in November, 1923. In addition to that, prompted by counsel, in her narration she stated that two other previous abortions had been performed upon her by the defendant. This was against the objection of the defendant which was overruled by the court. She did not go into details about the method of performance of the other two abortions, or say any-

thing as to the necessity of preserving her life on those occasions. In fact, she gave no one of the statutory ingredients of the crime. * * *

That is to say, applying the precedent to the instant case, even if the testimony were admissible, the prosecution had no right to have its witness make the bald statement that there were two other miscarriages, without including in her testimony the other statutory elements of the crime, viz., intent to destroy the child, and want of necessity to preserve the mother's life."

See also *State v. Bassett,* 194 P. 867, 26 N.M. 476.

In *Gart v. U. S.,* 294 F. 66, we have a related situation. There was a conviction for peddling narcotics. At the trial evidence was allowed, over defendant's objection, that he had been seen delivering a package to another person on the street—not charged in the indictment. The testimony did not identify the contents of the package and defendant moved to strike. The motion was denied. The court said:

"It must be apparent that such a line of testimony if not properly admissible would be highly prejudicial. Standing as evidence before the jury, it might easily lead them to the conclusion that the defendant was in the habit of making sales of narcotics on the streets * * * and yet there was no proof that the package * * * contained narcotic drugs. This left the matter in the nature of a mere suspicious circumstance, which not having been taken from the jury by the trial court left it with them for consideration. * * *

In consideration of this erroneous admission of testimony which was prejudicial to the defendant, the judgment * * * will be reversed * * *."

THE FOURTEENTH AMENDMENT IS APPLICABLE.

This Court said, in *Lyons v. Oklahoma,* 322 U.S. 596, 88 L. ed. 1481:

> "The Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of 'that fundamental fairness essential to the very concept of justice,' and in a way that 'necessarily prevents a fair trial.' "

Previously this Court said, in *Hebert v. Louisiana,* 272 U.S. 312, 71 L. ed. 270:

> "What it (the Fourteenth Amendment) does require is that state action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land.' Those principles are applicable alike in all the states and do not depend upon or vary with local legislation."

With respect to the interference by Federal power with the procedure of state courts, this Court has made this plain statement, in *Brown v. Mississippi,* 297 U.S. 278, 80 L. ed. 682:

> "The state is free to regulate the procedure of its courts in accordance with its own conception of policy, unless in so doing it 'offends some

> principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' * * * But the freedom of the State in establishing its policy is the freedom of constitutional government and is limited by the requirement of due process of law."

This Court has been importuned many times by those who have been denied counsel following arrest and frequently it has afforded relief for what was characterized as a denial of due process. In the leading case of *Powell v. Alabama,* 287 U.S. 45, 77 L. ed. 158, the opinion states, quoting from a Pennsylvania case:

> "It is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving the latter any opportunity to acquaint himself with the facts or law of the case. * * *
>
> * * * What we have decided is that to force a defendant, charged with a serious misdemeanor, to trial within five hours of his arrest, is not due process of law, regardless of the merits of the case."

But what good are the services of counsel if the prosecution can present at a trial evidence of six other alleged offenses of which accused and counsel have had no notice and with which they are suddenly confronted without any opportunity to secure any defense except through the possibility of cross-examination and by the denial of the accused? As to such denial, we offer the following statement in

the opinion of the New York Court of Appeals in *People v. Fishgold,* 71 N.Y.S. 2d 830:

> "While it is unquestionably true that the defendant denied the commission of the crimes imputed to him by these questions, nevertheless it would be absurd to suppose for one moment that the jury believed those denials."

It is respectfully submitted that denial of a right to counsel is not a greater violation of due process than to impose upon a defendant with counsel evidence of the nature admitted in the instant case.

There are many other cases where courts have decided that errors during the trial were so prejudicial as to demand reversal and the grant of new trials. Some of them are:

People v. Darby, 148 P. 2d 28, 64 Cal. App. 2d 25;

People v. Hooper, 207 P. 2d 117, 92 Cal. App. 2d 524;

People v. Carborano, 92 N.E. 2d 871, 301 N.Y. 39;

People v. Daghita, 86 N.E. 2d 172, 299 N.Y. 194;

People v. Brown, 50 N.E. 2d 236, 290 N.Y. 830;

People v. Bonier, 72 N.E. 226, 179 N.Y. 315;

State v. Folsom, 183 P. 2d 510, 28 Wash. 2d 421;

State v. Rodriguez, 152 P. 2d 970, 21 Wash. 2d 667;

Fetty v. State, 230 N.W. 440, 119 Neb. 619;

Toth v. State, 3 N.W. 2d 899, 141 Neb. 448;

Morgan v. Commonwealth, 142 S.W. 2d 123, 283 Ky. 588;

Giles v. State, 32 S.E. 2d 111, 71 Ga. App. 768;
State v. Miller, 88 P. 2d 526, 60 Ida. 79;
U. S. v. Dressler, 112 F. 2d 972;
Lovely v. U. S., 169 F. 2d 386;
People v. Schultz, 115 N.E. 140, 277 Ill. 238;
Romes v. Commonwealth, 175 S.W. 669, 164 Ky. 334.

Petitioner believes that the admission of testimony as to the other alleged offenses was particularly injurious because there was insufficient evidence of the use of an instrument, as charged in the indictment. Mrs. Andersen said she saw an instrument in defendant's hand. Dr. Wald said he found in her body evidence of abortion with an instrument. That is the extent of the testimony in that regard. The use of an instrument was a necessary element and the burden was on the State to prove it. There was no evidence that an instrument was used. Mrs. Andersen described it as a slender thing like a pencil, eight or ten inches long, with a hook on it; she said it was in petitioner's hand but she did not say he was near her at the time. No anesthetic was administered and Mrs. Andersen was fully conscious all the time. The indictment charges that the petitioner "used instruments in and upon the body" of Mrs. Andersen; there is no crime in petitioner having an instrument in his hand, especially when its utility value is not shown. There was no testimony to show that the instrument she described had any value for use in performing an abortion.

It is petitioner's belief that the jury could have concluded, upon that testimony, that the State had failed to prove the charge in the indictment. Therefore, the evidence of the other alleged abortions could easily sway the jurors. They would be less than human if they did not conclude that a physician who allegedly had performed six other abortions surely performed the one charged in the indictment. They would not hesitate long over the presence or absence of an instrument. In a brief presented by the prosecuting attorney to the Supreme Court of Nevada concerning this case, he stated that petitioner "should indeed consider himself fortunate that he was not prosecuted for such other acts." Who can say that the jurors did not entertain a similar thought? Thus, petitioner was on trial for seven offenses, not one only, and as to six of them without any notice.

Petitioner respectfully submits that the admission of the evidence of other alleged abortions was error of such a prejudicial nature that he did not receive a fair trial; he is entitled under the Fourteenth Amendment to a new trial when he will be tried upon the indictment alone and the jury will have before it only such evidence as relates to that indictment.

Dated, Reno, Nevada,
July 10, 1953.

GEORGE L. VARGAS,
Attorney for Petitioner.

MILTON W. KING,
Of Counsel.

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In The
Supreme Court of the United States

OCTOBER TERM, 1953

KENNETH L. ELGES,
Petitioner,
vs.
STATE OF NEVADA,
Respondent.

No. 180

RESPONDENT'S BRIEF

ALAN BIBLE,
Counsel for Respondent.

W. T. MATHEWS,
Attorney General of Nevada,

GEO. P. ANNAND,
Deputy Attorney General,

WILLIAM N. DUNSEATH,
Deputy Attorney General,

JOHN W. BARRETT,
Deputy Attorney General,

JACK STREETER,
District Attorney, Washoe County,
Of Counsel for Respondent.

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In The
Supreme Court of the United States

OCTOBER TERM, 1953

KENNETH L. ELGES,
Petitioner,
vs.
STATE OF NEVADA,
Respondent.

No. 180

RESPONDENT'S BRIEF

STATEMENT

The petitioner above named was indicted by a Grand Jury of Washoe County, State of Nevada, for violation of the statutes of Nevada (Nevada Compiled Laws 1929, Section 10129, Criminal Abortion Defined).

Trial was had to a jury in the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, on a plea of "not guilty." At the conclusion of the trial a verdict of "Guilty as Charged" was rendered against petitioner and Judgment was entered October 29, 1951, and he was sentenced to imprisonment in the Nevada State Prison, pursuant to law for a period of not less than one year nor more than five years. The Court, under the provisions of the statute, granted probation upon condition that defendant serve one year in the county jail. Defendant was subsequently admitted to bail.

The District Court denied defendant's motion for new trial, and appeal was had to the Supreme Court of the State of Nevada.

The Supreme Court affirmed the judgment of the lower court in an opinion dated December 29, 1952 (State v. Elges, 251 P (2) 590). Rehearing denied March 11, 1953. R. 123.

Points Involved

1. That, in the petition for rehearing, the admission of incompetent testimony was a denial to the petitioner of a fair trial and due process of law under the Fourteenth Amendment.

2. That the evidence against him relevant to the indictment was insufficient to warrant the verdict of guilty by the jury.

3. Petitioner alleges that the Supreme Court has decided a Federal question of substance in a way not in accord with applicable decisions of this Court. Pet. pages 5, 6, 7.

Questions Presented

1. Will the admission of evidence of similar offenses, when it tends to establish intent or a common plan to violate the law, when safeguarded by plain instructions, constitute an arbitrary exercise of judicial power in denial of constitutional rights guaranteed to petitioner under the Fourteenth Amendment to the Constitution of the United States?

2. Will this Court revise a judgment of a State Court where it does not appear upon the record filed with it that the point relied upon was made in the State Court and decided adversely, and that the section of the Constitution of the United States relied upon was distinctly brought to the attention of the State Court?

Jurisdiction

Petitioner claims that the jurisdiction of this Court is invoked upon the ground that (1) Federal questions have been both submitted to and decided by the Supreme Court of Nevada, and (2) that the Supreme Court of Nevada has decided a Federal question of substance not theretofore decided by this Court, or has

decided it in a way probably not in accord with applicable decisions of this Court.

State of the Record Upon Which Petitioner Claims Federal Questions Were Submitted to the State Courts—Assignment of Errors to the State Supreme Court

1. That evidence was insufficient to warrant a verdict of guilty and that the Court erred in refusing request for a directed verdict of acquittal. R. 117.

2. That, notwithstanding the Court's instruction, the testimony was improperly admitted and was highly prejudicial; that its admission accordingly was reversible error. R. 119.

Nowhere in the assignment of errors is there to be found any reference, specific or otherwise, that the petitioner was by the State courts denied any right, title, privilege or immunity claimed under and guaranteed by the Constitution of the United States.

In petitioner's written motion for rehearing before the Supreme Court of Nevada, petitioner for the first time stated that the Supreme Court of Nevada by its decision is approving the denial of the right to a fair trial and due process, which are promised in the Constitution of the United States.

The Record Lodged in This Court Discloses That the Federal Question Relied Upon by Petitioner Was Not Raised or Distinctly Brought to the Attention of the State Court, Submitted to nor Decided by the State Court.

The rule of this Court is that in order to give it jurisdiction to review the judgment of a State Court, because of denial by the State Court of any right, title, privilege or immunity claimed under the Constituion of the United States, it must appear on the record that such title, right, privilege or immunity was specially set up or claimed at the proper time and in the proper way. That in order to give the Supreme Court the power to revise a judgment

of a State Court it must appear upon the record filed with it that the point relied upon was made in the State Court and decided adversely, and that the section of the Constitution of the United States relied upon was distinctly brought to the attention of the State Court. Farney v. Towle, 66 U.S. 350; Hoyt v. Thompson, 66 U.S. 518; Worthy v. County Commrs., 76 U.S. 565; Leeper v. Texas, 139 U.S. 462; Miller v. Texas, 153 U.S. 535; Miner v. Georgia, 183 U.S. 559; Thomas v. Iowa, 209 U.S. 258.

Neither the petition for rehearing, nor assignment of errors in the Federal Supreme Court, can cure the failure of the record to show that a Federal question was raised and decided which would confer jurisdiction on the Federal Supreme Court.

It is not enough that there may be somewhere hidden in the record a question which if it had been raised would have been of a Federal nature. Mellon v. O'Neil, 275 U.S. 212.

The contention made in the highest court of a State may not be enlarged for the purpose of invoking the jurisdiction of the Federal Supreme Court by assignment of errors made to bring the case to that Court. Cleveland & Pittsburg R. R. Co. v. City of Cleveland, 235 U.S. 50.

Writ of Certiorari will be dismissed where granted upon the erroneous supposition that petitioner had properly raised and relied upon the indicated Federal questions in the State Court. Missouri Pac. R. R. Co. v. Hanna, 266 U.S. 184.

> It is essential to the jurisdiction of the Supreme Court on certiorari to a state court that it appear affirmatively from the record not only that a Federal question was presented for decision in that court, but also that its decision of the Federal question was necessary to the determination of the cause, and that the question was actually decided or that the judgment as rendered could not have been given without deciding it. Jurisdiction of the Supreme Court on certiorari cannot be founded on surmise as to what, if any, Federal question the state

court rested its opinion and decision upon; nor can a claim of jurisdiction be sustained by reference to briefs or statements which are not part of the record. 54 Am. Jur. 901, Sec. 263, citing McGoldrick v. Gulf Oil Corp., 309 U.S. 2; Lynch v. New York, 293 U.S. 52.

On certiorari to the Supreme Court of Missouri in Williams v. Kaiser, 233 U.S. 471, this Court said at pages 477, 478:

> It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. Honeyman v. Hanan, 300 US 14, 18, 81 L ed 476, 478, 57 S Ct 350; Lynch v. New York, 293 US 52, 79 L ed 191, 55 S Ct 16. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. Klinger v. Missouri, 13 Wall. (US) 257, 263, 20 L ed 635, 637; Walter A. Wood Mowing & Reaping Mac. Co. v. Skinner, 139 US 293, 297, 35 L ed 193, 195, 11 S Ct 528; Allen v. Arguimbau, 198 US 149, 154, 155, 49 L ed 990, 993, 25 S Ct 622; Lynch v. New York, 293 US 52, 79 L ed 191, 55 S Ct 16, supra. We adhere to those decisions.

The United States Supreme Court's consideration of a case will be limited to the questions presented by the petition for Writ of Certiorari. Crown Cork & Seal Co. v. Ferdinand Gutmand Co., 304 U.S. 159; General Talking Pictures v. Western Electric Co., 304 U.S. 175; Wilson v. Cook, 327 U.S. 474.

And such questions must be Federal questions asserted and presented to the State Court. Meredith v. Winterhaven, 230 U.S.

228; Hartford L. Ins. Co. v. Johnson, 249 U.S. 490; Herndon v. Georgia, 295 U.S. 441; New York ex rel. Cohn v. Graves, 300 U.S. 308; Anno. 79 L. Ed. 1539.

Further, the raising of a Federal question for the first time in a petition for rehearing in the highest State Court is insufficient and comes too late unless such court actually entertains the petition and *expressly decides the question.* There must be language in the court's opinion and decision clearly indicating that the Federal question was considered and decided.

The words "maturely considered" in the judgment of denial without opinion by the highest State Court of a petition for rehearing do not import a decision of the Federal question first raised by such petition so as to sustain a writ of error from the Federal Supreme Court. Consolidated Turnpike Co. v. Norfolk & O. V. R. Co., 228 U.S. 326, 33 S. Ct. 510.

It is well settled that it is too late to raise a Federal question for the first time in a petition for rehearing after final judgment of the State Court of last resort. Consolidated Turnpike Co. v. Norfolk & O. V. R. Co., 228 U.S. 326, supra.

The State Supreme Court must have exercised its jurisdiction in such a way that the case could have been presented in this Court had the question been raised prior to the original disposition of the appeal. Radio Station WOW v. Johnson, 326 U.S. 120; American Surety Co. v. Baldwin, 287 U.S. 156; Forbes v. State Council, 216 U.S. 396; Simmerman v. Nebraska, 116 U.S. 54.

This Court in McCorquodale v. State of Texas, 211 U.S. at page 437, held:

> This court has decided many times that it is too late to raise a Federal question for the first time in a petition for rehearing in the court of last resort of a State after that court has pronounced its final decision. Loeber v. Schroeder, 149 U.S. 580, 585; Pim v. St. Louis, 165 U.S. 273. It is true that we have also decided that if

> the court entertains the motion and passes on the Federal question, we will review its decision. But it must appear that the court has done so. Mallett v. North Carolina, 181 U.S. 589; Leigh v. Green, 193 U.S. 79; Corkran Oil Co. v. Arnaudet, 199 U.S. 182, 193; Fullerton v. Texas, 196 U.S. 192; McMillen v. Ferrum, 197 U.S. 343.

In Herndon v. Georgia, 295 U.S. 441, this Court held that an attempt to raise a Federal question in a State Court after judgment, upon a petition for rehearing, does not furnish a basis for review by this Court unless the State Court actually entertains the question and decides it.

The State Supreme Court Neither Expressly Nor at All Decided a Federal Question

The contentions of petitioner, presented and submitted to the State Supreme Court, were that the evidence was insufficient to warrant a verdict of guilty and that the trial court erred in refusing his request for a directed verdict of acquittal. That there was not sufficient corroboration under the requirement of Section 10974, N.C.L. 1929. R. 117. That the State presented testimony of six other women all of whom testified to have the Daly City contact with Golding and the trip to Reno and to receiving an abortion operation at the hands of defendant (petitioner).

The State Supreme Court, held, "Since the evidence of the offense with which defendant was charged went to the jury without contradiction or explanation by the defendant, there was no issue in the evidence upon which the testimony of other offenses might have swayed the jury." R. 120. The Court, on the same page, in reference to cases presented by defendant, remarked that one of the cases held that such evidence is inadmissible unless and until absence of criminal intent is affirmatively asserted by the defendant. R. 120.

The State Supreme Court, R. 119, said:

> With reference to this testimony the court instructed the jury as follows: "Such evidence was received for a limited purpose only; not to prove distinct offenses or continual criminality, but for such bearing, if any, as it might have on the question whether the defendant is innocent or guilty of the crime charged against him in the indictment. You are not permitted to consider that evidence for any other purpose, * * *. The value, if any, of such evidence depends on whether or not it tends to show that the defendant entertained the intent which is a necessary element of the alleged crime for which he is now on trial * * *." State v. Vertrees, 33 Nev. 509, 112 P. 42.

The State Supreme Court did not decide a Federal question, as no such question was submitted. The case was decided upon adequate State grounds.

The State Court said:

> In our view, however, the question of admissibility of this evidence upon any of the grounds asserted by defendant need not be decided in this case. In any event we should be compelled to hold that its admission was not prejudiced under section 11266 N.C.L. 1929. That section provides: "No judgment shall be set aside, or new trial granted, in any case on the ground of misdirection of the jury or the improper admission or objection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case, it shall appear that the error complained of has resulted in a miscarriage of justice, or has actually prejudiced the defendant, in respect to a substantial right." R. 120.

Sufficient corroboration of the offense under the requirements of Section 10975, N.C.L. 1929, provides that the defendant shall not be convicted upon the testimony of the woman upon whom the offense shall have been committed, unless she is corroborated by other evidence. The other question presented to the Court was decided by the Court after due consideration of the evidence was expressed by the Court. "Nothing can be clearer, in our view, than that Juanita's testimony was amply corroborated within the requirements of our statute; that the corroboration tended to connect the defendant with the offense; that the testimony of Juanita and of the doctor supplied evidence of instrumentation; that the court was not in error in refusing to direct a verdict for the defendant." R. 119.

Thus it appears that nowhere in such opinion is there any decision of such court wherein it can be inferred a Federal question had been submitted to it, and it clearly appears that the Court did not decide a Federal question, but to the contrary decided the matter upon adequate State grounds.

While we may appear to be repetitious we respectfully submit that it appears aphoristic that when a State Court rests its decision on adequate State grounds this Court will not assume jurisdiction even though it can be said a Federal ground could have been the basis of such decision. Klinger v. Missouri, 13 Wall. U.S. 257; Adams v. Russell, 229 U.S. 353; Lynch v. New York, 293 U.S. 52; Woods v. Nierstheimer, 328 U.S. 211.

In Steinbridge v. Georgia, 343 U.S. 541, this Court said on page 543:

> It is apparent from the record that the Supreme Court of Georgia took no action upon the federal constitution raised for the first time on the motion for rehearing in the Court of Appeals.
>
> Where the highest court of the state delivers no opinion and it appears that the judgment might have rested

upon a non-federal ground, this Court will not take jurisdiction to review the judgment. Citing Hedgebeth v. North Carolina, 334 U.S. 806; Woods v. Nierstheimer, 328 U.S. 211; White v. Regan, 324 U.S. 760; Lynch v. New York ex rel Pierson, 293 U.S. 52; Klinger v. Missouri, 13 Wall. 257.

Concluding the decision the Court said: "We are without jurisdiction when the question of the existence of an adequate state ground is debatable." Citing Bachtel v. Wilson, 204 U.S. 36.

Leeper v. Texas, 139 U.S. 462, Chief Justice Fuller, after stating the case, delivered the opinion of the Court. The jury found each of defendants guilty of murder and assessed punishment at death. Exceptions were taken in the admission of testimony of other distinct offenses committed near the scene of the murder and immediately afterwards; inspection of the body of one of the defendants after his arrest, and failure of court to charge in relation to murder in second degree. Defendants moved for a new trial on the grounds of error in these rulings, and also because one of the jurors was not qualified. The motion was overruled and the case taken by appeal to the Court of Appeals, and errors therein assigned, raising the same points. The judgment was affirmed, after which a rehearing was applied for and the application heard and overruled. The Court decided that the evidence tending to show assaults upon other parties by the defendants, almost simultaneously with the assault made by them upon deceased and at the same place, in pursuance of a general plan to rob the parties assaulted, was admissible, such assaults being part of the res gestae. (Page 464.) The earliest suggestion of the existence of a Federal question in the cause was made in the motion for rehearing (pages 465-466). This Court in concluding its decision said:

The sufficiency of the indictment, the degree of the offense charged, the admissibility of the testimony

objected to, and the alleged disqualification of the juror because he was not a freeholder, were all matters with the disposition of which, as exhibited by this record, we have nothing to do.

We find nothing special, partial or arbitrary or in violation of fundamental principles in the criminal laws of the State of Texas, involved, and we perceive no ground for holding that the proceedings complained of, which were had in the ordinary administration of those laws, amounted to a denial by the State of due process of law to these parties, or of some right secured to them by the Constitution of the United States. In re Kemmler, 136 U.S. 436, 449; Caldwell v. Texas, 137 U.S. 692. Although no right, title, privilege or immunity was specially set up or claimed at the proper time and in the proper way, and no Federal question was passed upon by the state courts or raised, except by the general averment in the petition for rehearing that the indictment was so defective that it, or the statute which authorized it, contravened the Constitution, yet, as full argument was permitted at the bar, upon the assumption that the writ of error was providently issued, we will instead of dismissing the writ, affirm the judgment. Judgment affirmed.

STATE OF THE RECORD AS TO TESTIMONY OF LIKE OFFENSES

The record shows that like offenses were committed by defendant, petitioner, at the same place and during a short period of time after the offense charged in the indictment. R. 12, 68, 72, 76, 81-83, 89, 96.

Such testimony was not contradicted and was offered to show intent and for the purpose of showing the plan and scheme of the defendant. Admitted by the Court for a limited purpose only. R. 62.

Conclusion

This Court held in Barrington v. Missouri, 205 U.S. 483, that the rulings of a State Court with respect to the admission of evidence is not subject to review by this Court, saying:

> In our judgment no federal question was involved. Were this otherwise it would follow that we could decide in any case that the trial court abused its discretion under the laws of the State of Missouri, although the Supreme Court of that state had held to the contrary.

We respectfully submit that the Writ of Certiorari should be denied.

ALAN BIBLE,
Counsel for Respondent.

W. T. MATHEWS,
Attorney General of Nevada,

GEO. P. ANNAND,
Deputy Attorney General,

WILLIAM N. DUNSEATH,
Deputy Attorney General,

JOHN W. BARRETT,
Deputy Attorney General,

JACK STREETER,
District Attorney, Washoe County,
Of Counsel for Respondent.